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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**

IN RE TELESCOPES ANTITRUST  
LITIGATION

This Document Relates to:

SPECTRUM SCIENTIFICS LLC, RADIO  
CITY, INC., and those similarly situated,

Plaintiffs,

v.

CELESTRON ACQUISITION, LLC, SUZHOU  
SYNTA OPTICAL TECHNOLOGY CO., LTD.,  
SYNTA CANADA INT'L ENTERPRISES  
LTD., SW TECHNOLOGY CORP., OLIVON  
MANUFACTURING CO. LTD., OLIVON USA,  
LLC, NANTONG SCHMIDT OPTO-  
ELECTRICAL TECHNOLOGY CO. LTD.,  
NINGBO SUNNY ELECTRONIC CO., LTD.,  
PACIFIC TELESCOPE CORP., COREY LEE,  
DAVID SHEN, SYLVIA SHEN, JACK CHEN,  
JEAN SHEN, JOSEPH LUPICA, DAVE  
ANDERSON, LAURENCE HUEN, and DOES  
1-50,

Defendants.

Case No. 5:20-cv-03639-EJD

Case No. 5:20-cv-03642-EJD

**DIRECT PURCHASER PLAINTIFFS'  
NOTICE OF MOTION AND MOTION  
TO ENFORCE DISCOVERY ORDER  
AND FOR SANCTIONS FOR  
VIOLATIONS OF COURT ORDERS**

**Date:** March 21, 2023  
**Time:** 10:00 a.m.  
**Judge:** Hon. Virginia K.  
DeMarchi  
**Location:** Courtroom 2 – 5th Fl.  
  
**Compl. Filed:** June 1, 2020  
**Third Am.** August 31, 2021  
**Compl. Filed:**  
**Trial Date:** None Set

## **NOTICE OF MOTION AND MOTION**

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that on March 21, 2023, at 10:00 a.m. or as soon thereafter as the  
4 matter may be heard before the Honorable Virginia K. DeMarchi, in the United States District  
5 Court for the Northern District of California at the San Jose Courthouse, 280 South 1st Street,  
6 Courtroom 2, 5th Floor, San Jose, CA 95113, Direct Purchaser Plaintiffs will move this Court to  
7 compel Defendants to (1) produce complete, unfiltered transactional data, as previously ordered by  
8 the Court, (2) provide written responses to the facilitating questions accompanying the production  
9 of complete, unfiltered transactional data, as previously ordered by the Court, and (3) explain the  
10 review and production process utilized to identify and generate the complete, unfiltered  
11 transactional data. Additionally, Defendants should be sanctioned for violating the Court's Orders  
12 pursuant to Federal Rule of Civil Procedure 37 and the Court's inherent powers, in the form of an  
13 order requiring Defendants to pay DPPs' reasonable expenses and attorney's fees in the amount of  
14 \$90,333.25 and precluding Defendants from opposing certification of the DPP class during class  
15 certification proceedings.

16 This Motion is based on this Notice of Motion and Motion, the accompanying  
17 Memorandum, the Declaration of Matthew Borden, the Declaration of Christopher Groves, the files  
18 and records in this action, and on such other written and oral argument as may be presented to the  
19 Court.

21 | Dated: February 8, 2023

Respectfully submitted,

## BRAUNHAGEY & BORDEN LLP

By: /s/ *Matthew Borden*  
Matthew Borden

## Attorneys for Direct Purchaser Plaintiffs

## TABLE OF CONTENTS

2	INTRODUCTION .....	1
3	BACKGROUND .....	2
4	A.    DPP’s Efforts to Obtain Defendants’ Transactional Data .....	2
5	B.    The Court Compels Defendants to Produce Their Transactional Data .....	4
6	C.    Defendants’ Violate the Court’s Second Order Compelling Them to Produce	
7	Their Transactional Data .....	5
8	D.    Defendants’ Incomplete Productions of Transactional Data in Recent Months....	5
9		
10	ARGUMENT .....	8
11	I.    DEFENDANTS ARE IN VIOLATION OF THE COURT’S ORDER FOR	
12	FAILING TO PRODUCE COMPLETE TRANSACTIONAL DATA .....	8
13	II.    SANCTIONS ARE WARRANTED.....	12
14	A.    DPPs’ Expenses, Including Attorney’s Fees, Under Rule 37(b)(2)(C) .....	12
15	B.    Defendants Should be Compelled to Explain Failure to Comply with Orders....	14
16	C.    The Court Should Preclude Defendants from Opposing Class Certification .....	15
17		
18	CONCLUSION.....	17

## TABLE OF AUTHORITIES

	PAGE(S)
<b>CASES</b>	
3 <i>Anderson v. Fresno Cty., Human Servs. Sys.,</i> 4           No. 1:05-CV-1325-LJO, 2007 WL 1865657 (E.D. Cal. June 28, 2007).....	12
5 <i>Apple, Inc. v. Samsung Elecs. Co., Ltd.,</i> 6           No. 11-CV-01846-LHK, 2012 WL 3155574 (N.D. Cal. Aug. 2, 2012) .....	17
7 <i>Bradburn Parent/Teacher Stores, Inc. v. 3M,</i> 8           No. Civ.A.02-7676, 2004 WL 1842987 (E.D. Pa. Aug. 18, 2004) .....	10
9 <i>California Earthquake Auth. v. Metro. W. Sec., LLC,</i> 10          No. 2:10-CV-0291 MCE GGH, 2012 WL 6651152 (E.D. Cal. Dec. 20, 2012) .....	14
11 <i>Gibson v. Chrysler Corp.,</i> 12          261 F.3d 927 (9th Cir. Aug. 21, 2001) .....	17
13 <i>HRC-Hainan Holding Company, LLC v. Yihan Hu,</i> 14          No. 19-mc-80277-TSH, 2020 WL 1643786 (N.D. Cal. Apr. 2, 2020) .....	14
15 <i>In re Dynamic Random Access Memory Antitrust Litig.,</i> 16          No. M 02-1486 PJH, 2006 WL 1530166 (N.D. Cal. June 5, 2006).....	10
17 <i>In re Live Concert Antitrust Litig.,</i> 18          247 F.R.D. 98 (C.D. Cal. 2007).....	10
19 <i>In re Ng,</i> 20          No. 06-30904 TEC, No. 07-3071 TC, 2009 WL 2905849 (Bankr. N.D. Cal. Sept. 3, 2009)....	16
21 <i>Ingrid &amp; Isabel, LLC v. Baby Be Mine, LLC,</i> 22          No. 13-cv-01806-JCS, 2014 WL 1338480 (N.D. Cal. Apr. 1, 2014).....	13
23 <i>Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,</i> 24          456 U.S. 694 (1982) .....	16, 17
25 <i>Li v. A Perfect Day Franchise, Inc.,</i> 26          281 F.R.D. 373 (N.D. Cal. 2012) .....	16
27 <i>Microtherm, Inc. v. Norman Wright Mech. Equip. Corp.,</i> 28          No. C 04-2266 JW (PVT), 2010 WL 10133699 (N.D. Cal. Sept. 22, 2010).....	13
29 <i>Nat'l Hockey League v. Metro. Hockey Club, Inc.,</i> 30          427 U.S. 639 (1976) .....	16
31 <i>Nichols v. SmithKline Beecham Corp.,</i> 32          No. CIV.A. 00-6222, 2003 WL 302352 .....	10

1	<i>Resolute Forest Prods., Inc. v. Greenpeace Int'l,</i> No. 17-cv-02824-JST (KAW), 2022 WL 16637990 (N.D. Cal. Nov. 2, 2022) .....	16, 17
2	<i>Stone Brewing Co., LLC v. MillerCoors LLC,</i> No. 18CV331-BEN-LL, 2019 WL 5677844 (S.D. Cal. Oct. 31, 2019) .....	15
4	<i>Stone Brewing Co., LLC v. MillerCoors LLC,</i> No. 3:18-CV-0331-BEN-LL, 2020 WL 6112188 (S.D. Cal. Oct. 16, 2020) .....	15
5		
6	<i>Theme Promotions, Inc. v. News Am. Mktg. FSI,</i> 546 F.3d 991 (9th Cir. 2008) .....	10
7	<i>Varney v. Cal. Highway Patrol,</i> No. C11-4193 TEH (JSC), 2013 WL 2299544 (N.D. Cal. May, 24, 2013) .....	13
9	<i>Wyle v. R.J. Reynolds Indus., Inc.,</i> 709 F.2d 585 (9th Cir. 1983) .....	16
10		
11	<b><u>RULES</u></b>	
12	Fed. R. Civ. P. 37 .....	passim
13	Fed. R. Civ. P. 26 .....	8
14		
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1 Direct Purchaser Plaintiffs (“DPPs”) respectfully submits this Memorandum in support of  
 2 its Motion to Enforce the Court’s Discovery Order.

3 **INTRODUCTION**

4 DPPs propounded discovery requests on August 24, 2020 requesting Defendants’ customer  
 5 sales, cost, and pricing transactional data essential to these antitrust claims. The Court twice  
 6 ordered Defendants to produce the information, but Defendants still have refused to do so. In its  
 7 prior Orders, the Court recognized that the missing data is critical to DPPs’ ability to mount their  
 8 antitrust case. It is also the same type of information Defendants readily possess and use on a  
 9 regular, if not daily, basis to assess the cost and pricing of products offered and sold to consumers.  
 10 The prejudice caused by Defendants’ delay is significant and stands as the largest barrier to DPPs’  
 11 efforts to certify a class and run regressions determining the amount that Defendants overcharged  
 12 various customers during the period.

13 The failure to produce these documents is not due to any difficulty in finding the materials.  
 14 Defendants’ transactional data is simply numbers and names and can be produced without privilege  
 15 review, word searches, or any other work that could legitimately delay discovery.

16 Rather, Defendants’ violations of the Court’s Orders are intentional. For example, the Court  
 17 ordered Defendants to produce transactional data “without filters.” (Dkt. 277 at 1.) In response to  
 18 the Court’s Order, Defendants obviously applied filters to their production. Further, their most  
 19 recent productions omit cost and sales data fields that they included in prior productions. The only  
 20 explanation for this is that Defendants eliminated data from their Court-ordered productions to  
 21 prevent DPPs from making use or sense of the data in violation of the Court’s Orders.

22 DPPs have spent substantial time and effort trying to get these documents and enforcing the  
 23 Court’s Orders. And while Defendants have been willfully flouting this Court’s Orders requiring  
 24 them to produce transactional data, they have been prolific in seeking the Court’s assistance on  
 25 other matters, filing at least 29 substantive motions seeking various forms of relief since Plaintiffs  
 26 first requested their transactional data in August 2020. This is a misuse of the judicial process  
 27 despite two Court Orders requiring them to produce it. Defendants’ should be sanctioned under  
 28 Rule 37 and the Court’s inherent powers. In addition to being ordered, again, to produce the

1 documents, Defendants should be required to pay DPPs' monetary costs and further explain what  
 2 they have done to comply with the Court's Orders. To date, those fees and costs have amounted to  
 3 \$90,333.25. Further, since this is a violation of a Court Order enforcing a prior Court Order, the  
 4 Court should impose non-monetary sanctions that, at minimum, preclude Defendants from  
 5 opposing class certification.

6 **BACKGROUND**

7 **A. DPP's Efforts to Obtain Defendants' Transactional Data**

8 On August 24, 2020, DPPs propounded document requests seeking Defendants'  
 9 transactional data. (Declaration of Matthew Borden ("Borden Decl."), Ex. 1, Request Nos. 7, 38-  
 10 45, 91-92.) DPPs propounded additional document requests concerning transaction-level data on  
 11 October 30, 2020. (*Id.*, Ex. 2, Request Nos. 96-98.) Defendants did not provide any transactional  
 12 data in response.

13 On October 27, 2021, the Court entered an Order requiring Defendants to produce their  
 14 transactional data by December 1, 2021 (Dkt. 212 ¶ 7). Defendants did not do so. What they did  
 15 produce, over a year after receiving the requests, was missing important, readily-available data,  
 16 such as the names of their customers. The data was so incomplete that it prevented DPPs from  
 17 performing the routine type of analysis done in antitrust cases. (Declaration of Chris Groves  
 18 ("Groves Decl.") ¶¶ 6-7, 9.)

19 DPPs began trying to figure out these issues with Defendants to avoid going to Court. On  
 20 March 4, 2022, DPPs along with the indirect purchaser plaintiffs ("IPPs") wrote to Defendants  
 21 seeking identification (by Bates ranges) of the documents in their productions responsive to the  
 22 requests for transactional data. (Borden Decl., Ex. 3.) Defendants refused to respond to the March  
 23 4, 2022, letter for two months.

24 On May 2, 2022, Defendants identified five Bates ranges from their production, including  
 25 one Bates range spanning millions of documents and claimed that their production was complete.  
 26 (*Id.*, Ex. 4.) Based on the information Defendants provided, DPPs identified many deficiencies in  
 27 Defendants' production, including that the documents in the identified Bates ranges failed to  
 28 provide key information associated with Defendants' transactions, such as transaction-level sales

1 data and associated cost data. (Borden Decl., Exs. 5, 6). As detailed below, DPPs tried to raise  
 2 those concerns as well.

3 Throughout 2022, DPPs continually sought to meet and confer with Defendants about their  
 4 transactional data production. Over the course of 2022, Defendants continued to avoid those  
 5 attempts in various ways, including by canceling multiple scheduled meet and confer calls (Borden  
 6 Decl., Ex. 8), failing to ensure the attendance of knowledgeable client representatives despite their  
 7 promises to do so (Borden Decl., Ex. 9), or simply never responding to DPPs requests to schedule  
 8 calls (Borden Decl., Ex. 7). A more detailed timeline of this process is set forth below:

- 9       • **3/04/22:** DPPs send letter seeking identification of documents within Defendants'  
 10      productions that constitute responsive transaction-level sales data
- 11      • **4/04/22:** DPPs send second letter after Defendants fail to respond to March 4 letter  
 12      and follow-up March 23 email
- 13      • **5/02/22:** Defendants send email with five Bates ranges containing the transactional  
 14      data and state that the "Suzhou Synta data will be forthcoming"
- 15      • **5/19/22:** DPPs send email identifying problems with the broad Bates ranges, which,  
 16      *inter alia*, do not appear to include categories of information sought in the document  
 17      requests; Defendants do not respond
- 18      • **5/26/22:** DPPs follow up on 5/19/22 email; Defendants state via email that they will  
 19      respond the following week
- 20      • **6/17/22:** DPPs follow up with a letter after having received no further response from  
 21      Defendants and request to meet and confer
- 22      • **6/22/22:** DPPs follow up to request time to meet and confer about transactional data
- 23      • **7/05/22:** the parties very briefly meet and confer about transactional data; DPPs  
 24      follow up via email to request further meet and confer time; Defendants do not  
 25      respond
- 26      • **7/06/22:** DPPs follow up to request further meet and confer; Defendants propose  
 27      7/11/22
- 28      • **7/10/22:** Defendants cancel 7/11/22 call scheduled for the next morning; DPPs  
 29      propose 7/12/22; Defendants do not respond
- 30      • **7/18/22:** DPPs send list of questions concerning the transactional data and request to  
 31      meet and confer within five business days with a client representative  
 32      knowledgeable about the electronic systems
- 33      • **7/20/22:** DPPs follow up via email; Defendants propose to meet and confer on  
 34      8/09/22
- 35      • **7/26/22 to 8/05/22:** DPPs collectively send five emails requesting confirmation of  
 36      date to meet and confer before Defendants respond

- 1     • **8/05/22:** Defendants propose to meet and confer with client representative present  
on 8/10/22
- 2     • **8/09/22:** the day before the meet and confer, Defendants state that client  
representative will not be available to participate in call until 8/15/22
- 3     • **8/10/22:** DPPs send letter with additional questions about transactional data
- 4     • **8/11/22:** Defendants state that no client representative will be available for 8/15/22  
call and propose a call with the client representative on 8/22/22
- 5     • **8/15/22:** the parties meet and confer with no client representative present
- 6     • **8/22/22:** less than two hours before the meet and confer call that client  
representative was supposed to attend, Defendants state that no client representative  
will be available until 8/29/22; the parties meet and confer with no client  
representative present
- 7     • **8/31/22:** meet and confer call; Defendants' client representative does not attend;  
Defendants disclose for the first time that they had applied filters and not produced  
all data

11 (the "Motion to Compel", Dkt. 260, at 6-8 (summarizing DPPs' attempts to meet and confer with  
12 Defendants).)

13     **B.     The Court Compels Defendants to Produce Their Transactional Data**

14     After DPPs' above efforts to obtain this basic information from Defendants did not succeed,  
15 DPPs filed a motion to compel Defendants to (1) complete their production of transactional data  
16 and (2) provide written responses to certain questions posed by Plaintiffs for the purpose of  
17 facilitating production and comprehension of the transactional data. (*Id.* at 4-5, 8.) Defendants  
18 opposed the motion, claiming that their production of transactional data was complete. (*Id.* at 9-13.)  
19 The Court rejected Defendants' arguments and granted the Motion to Compel. The Court ordered  
20 that, *inter alia*:

- 21         1.     Defendants must produce the Celestron transactional data, for  
22         the relevant period, without filters by **November 30, 2022**.
- 23         2.     Defendants shall provide the following information  
24         informally, but in writing, to Plaintiffs solely for the purpose of  
25         facilitating the production of transactional data by **November 30,**  
26         **2022**. For each defendant who has appeared in the case:
  - 27             a.     the name of any database programs or applications used  
28             to manage or store sales data in the ordinary course of business; []
  - 29             b.     whether Defendants believe that the transactional data  
30             available for production or produced to date includes or does not  
31             include each of the 19 categories of information described in  
32             Plaintiffs' RFP 96; [and]

c. the formats in which data may feasibly be exported from any database or system in Defendants' possession, custody, or control that contains sales data.

(Dkt. 277, at 1-2.)

**C. Defendants' Violate the Court's Second Order Compelling Them to Produce Their Transactional Data**

Defendants did not comply with the Court’s second Order compelling them to produce their transactional data. On November 30, 2022, Defendants made a production of transactional data, but the production was non-compliant for several reasons. (Borden Decl., Ex. 10.) First, it was still subject to various filters despite the Court’s Order requiring that the transactional data be “unfiltered.” Second, Defendants also omitted certain Celestron cost data from this production, as further detailed in Section D below. (Groves Decl., ¶¶ 6-7, 9.)

Defendants also violated the second part of the Court’s Order which required them to provide information to DPPs. Defendants failed to provide information responsive to the three categories identified in the Count’s Order for any Defendant other than Celestron, and did not supply any explanation for omitting this information. (Borden Decl., Ex. 11.)

During multiple meet and confer calls, Defendants represented that they would correct the deficiencies noted above by agreed-upon dates in January 2023, but Defendants failed to complete the production of data and information by those dates as well. (*Id.*, Ex. 13.) On January 19, 2023, Defendants made an additional production of transactional data, but this production remained deficient in numerous respects, which are discussed further in Sections D and I below. (*Id.*, Ex. 12.) To date, Defendants have not completed their production of the data and information that the Court ordered them to provide.

**D. Defendants' Incomplete Productions of Transactional Data in Recent Months**

Defendants recently made two productions of data, purporting to be the transactional data ordered by the Court in its second Order compelling Defendants to produce their transactional data. As further detailed in Section I below, numerous fields and categories of information are still missing from these latest productions.

1 The first set of issues concerns the sales data Defendants produced in DEFS021460464 (the  
 2 “Court-Ordered Sales Data Set”). For the period from 2001 through May 2015, Defendants’ sales  
 3 data was hosted on SyteLine. From June 2015 onward, Defendants’ sales data was hosted on SAP  
 4 Business by Design. (Groves Decl., ¶ 5.) As to the data hosted on SyteLine, the Court-Ordered  
 5 Sales Data Set excludes all data prior to 2005. (*Id.*, ¶ 6(a).)

6 Second, the Court-Ordered Sales Data Set lacks product characterizations that appeared in  
 7 earlier productions. (*Id.*, ¶ 6(c).) The limited descriptions available in the Court-Ordered Sales Data  
 8 Set do not reliably identify whether the products are telescopes, telescope accessories, or other  
 9 items Defendants have sold. (*Id.*)

10 Third, the Court-Ordered Sales Data Set also does not contain complete customer  
 11 information. For example, only 700 customers—all corporate retailers—are identified from 2016 to  
 12 2020. (*Id.*, ¶ 6(d).) Further, direct-to-consumer sales are also absent, although it is not clear whether  
 13 their data has been entirely omitted or summarily consolidated under corporate entities responsible  
 14 for distribution or direct shipments. (*Id.*) Defendants’ failure to produce complete customer  
 15 information intentionally violates the Court Order because Defendants previously produced  
 16 documents containing the same detailed customer information that they are now withholding. The  
 17 following screenshots illustrate the changes to customer information that took place prior to  
 18 Defendants’ production of the Court-Ordered Sales Data Set:

19 **Example 1: Invoice 561352**

20 **Fig. 1 – Defendants’ Court-Ordered Production**  
**DEFS021460464 (Customer Name “Brookstone – DS”)**

Customer #	Customer Name	Invoice #	Invoice Date	SKU (Product ID)	Description	Qty	Unit Price	USD	Extended Price
383	BROOKSTONE - DS	561352	12/14/2012	21073	TEL ASTROMASTER LT 60AZ	1	65	USD	65

23 **Fig. 2 – Defendants’ Prior Production**  
**DEFS000030562 (Name “Adams, Adrienne”)**

Cust Num	Name	Inv Num	Inv Date	Item	Description	Total Qty	Revenue	Cogs	Family	Gross Profit	Mod Family	Mod Customer
383	ADAMS, ADRIENNE	561352	41257	21073	TEL ASTROMASTER LT 60AZ	1	65	30.93	Entry Level Telescopes	34.07	Telescopes	All Other Customers

1 Fig. 1 and Fig. 2 both describe the same sale. This can be seen by comparing the invoice  
 2 numbers (561352). As seen in comparing Fig. 1 and Fig. 2, the old production had 13 fields,  
 3 whereas the new production has only 10 fields. Because Defendants' second production—which  
 4 was compelled by Court Orders—obviously has less information on its face, this means that some  
 5 type of screen was used to remove data. Moreover, the new production is missing fields for  
 6 revenue, COGS (cost of goods and services), and gross profit, all of which are critical information  
 7 to assess overcharges. Finally, the old production includes the name of an individual customer,  
 8 whereas the Court-Ordered Sales Data Set provides only the name of a company.

9 **Example 2: Invoice 568002**

10 **Fig. 3 – Defendants' Court-Ordered Production**  
 11 **DEFS021460464 (Customer Name “Brookstone – DS”)**

Customer #	Customer Name	Invoice #	Invoice Date	SKU (Product ID)	Description	Qty	Unit Price	USD	Extended Price
383	BROOKSTONE - DS	568002	1/14/2013	11075-XLT	TEL 11", CPC1100 W/ XLT COATING	1	2519	USD	2519

12 **Fig. 4 – Defendants' Prior Production**  
 13 **DEFS000030562 (Name “Carano, Bandel L”)**

Cust Num	Name	Inv Num	Inv Date	Item	Description	Total Qty	Revenue	Cogs	Family	Gross Profit	Mod Family	Mod Customer
383	CARANO, BANDEL L	568002	41288	11075-XLT	TEL 11", CPC1100 W/ XLT COATING	1	2519	1423	High End Telescopes	1096	Telescopes	All Other Customers

14 Figures 3 and 4 tell a similar story. The Court-ordered production for invoice 568002  
 15 contains less data and has key data fields for revenue, COGS, and gross profit screened out.

16 All told, sixteen fields of data are missing from Defendants' Court-ordered production of  
 17 the SyteLine documents, and twenty fields are missing from Defendants' Court-ordered production  
 18 of the SAP By Design documents. (*Id.*, ¶ 6(b).) Charts itemizing the missing fields are attached as  
 19 Exhibit 2 to Mr. Groves's Declaration.

20 Fourth, the Court-Ordered Sales Data Set does not contain any cost data. (*Id.*, ¶ 6(e).)  
 21 Earlier productions by Defendants' did contain that missing data, including “Landed Cost (Unit),”  
 22 “Landed Cost (Extended),” “Landed Cost,” and “Margin.” (*Id.*) Defendants' most recent  
 23 “corrective” production, DEFS21460465 (the “Court-Ordered Cost Data Set”), contains some cost  
 24 data from 2005 to 2022, but still does not contain all the information missing from the Court-  
 25 Ordered Sales Data Set. (*Id.*, ¶¶ 7, 9.) For example, the Court-Ordered Cost Data Set contains  
 26

1 information for only 2,343 unique SKUs, but excludes cost information for certain years for over  
 2 200 SKU/year combinations identified in the Court-Ordered Sales Data Set. (*Id.*, ¶ 9(b).) As  
 3 another example, the Court-Ordered Cost Data Set includes at least 1,183 records where the cost of  
 4 a given product appears as null or zero. (*Id.*, ¶ 9(c).)

5 As discussed in Section I below, these intentional omissions in the Court-Ordered Cost Data  
 6 Set also violate the Court's second Order.

7 **ARGUMENT**

8 When a party violates a Court Order, Rule 37(b)(2)(A) permits the court to issue "further  
 9 just orders" in its discretion and specifically lists an array of potential sanctions, including  
 10 "directing that the matters embraced in the order or other designated facts be taken as established  
 11 for purposes of the action, as the prevailing party claims"; "prohibiting the disobedient party from  
 12 supporting or opposing designated claims or defenses, or from introducing designated matters in  
 13 evidence"; and "rendering a default judgment against the disobedient party." Fed. R. Civ. P.  
 14 37(b)(2)(A). A party's failure to disclose relevant information as required by Rule 26 also  
 15 empowers the Court with discretion to impose sanctions, including the payment of the opposing  
 16 party's attorneys' fees, informing the jury of the party's failure, or "other appropriate sanctions."  
 17 Fed. R. Civ. P. 37(c)(1).

18 **I. DEFENDANTS ARE IN VIOLATION OF THE COURT'S ORDER FOR FAILING  
 19 TO PRODUCE COMPLETE TRANSACTIONAL DATA**

20 On October 27, 2021, the Court entered the first Order requiring Defendants to complete  
 21 production of transactional data by December 1, 2021. (Dkt. 212 ¶ 7.) As the Court already found,  
 22 Defendants violated the Court's first Order. After they refused to complete production of  
 23 transactional data by that date and falsely claimed that their production was complete, DPPs tried to  
 24 engage and resolve the issue through nearly a year's worth of discovery correspondence, while  
 25 Defendants postponed or canceled meet and confer calls. (*See supra*, Section A (citing Borden  
 26 Decl., Exs. 7-9).) After DPPs were forced to bring a successful Motion to Compel, that should have  
 27 ended this issue—but it did not.

28

1           In its second Order, the Court granted Plaintiffs' joint Motion to Compel, requiring *inter*  
 2 *alia* that Defendants 1) "produce the Celestron transactional data, for the relevant period, without  
 3 filters"; 2) provide written responses to certain questions Plaintiffs had previously asked, "for the  
 4 purpose of facilitating the production of transactional data," including: "the name of any database  
 5 programs or applications used to manage or store sales data in the ordinary course of business,"  
 6 "whether Defendants believe that the transactional data available for production or produced to date  
 7 includes or does not include each of the 19 categories of information described in Plaintiffs' RFP  
 8 96," and "the formats in which data may feasibly be exported from any database or system in  
 9 Defendants' possession, custody, or control that contains sales data," all by November 30, 2022.  
 10 (Dkt. 277, at 1-2.)

11           Defendants violated each aspect of the Court's second Order, because they did not fully  
 12 produce and provide the data and information called for by the Court's Order by the date of  
 13 compliance. Rather, they provided incomplete transactional data, which was still subject to various  
 14 filters despite the Court's Order requiring that the transactional data be "unfiltered," and omitted  
 15 certain Celestron cost data. (Borden Decl., Ex. 10.) Defendants also failed to answer the facilitating  
 16 questions posed by the Court in the second Order, even further limiting the utility of the deficient  
 17 data productions contained in the Court-Ordered Sales Data Set and the Court-Ordered Cost Data  
 18 Set.

19           The Court-Ordered Sales Data Set violates the Court's Order for at least three reasons:  
 20           First, it is missing several fields and categories of data from the period of 2001 through  
 21 May 2015, which relates to data hosted on SyteLine; and data missing from June 2015 onward,  
 22 which is hosted on SAP Business by Design. (Groves Decl., ¶ 6.) These fields and categories of  
 23 missing data include without limitation: (1) the omission of any SyteLine-hosted data prior to 2005;  
 24 (2) missing product characterizations that were included in earlier transactional data productions  
 25 and are needed to identify the products sold; and (3) complete customer information needed to  
 26 identify the purchaser of goods in detail. (*Id.*)

27           Defendants necessarily removed these fields using filters. This is clear because Defendants'  
 28 initial production of data included data from 2001-2005, but the subsequent Court-ordered

1 production omits it. Unfiltered 2001-05 data is needed because the antitrust conspiracy in this case  
 2 is alleged to have begun in 2005. As numerous courts have recognized, such “before and after”  
 3 market data is relevant to establishing antitrust causation and damages, including on a class-wide  
 4 basis. *See Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1005 (9th Cir. 2008)  
 5 (holding that “the ‘before and after’ picture of [plaintiff]’s business provided by [plaintiff]’s  
 6 damages expert . . . helped to establish causation.”); *see also In re Live Concert Antitrust Litig.*,  
 7 247 F.R.D. 98, 145 (C.D. Cal. 2007) (noting that the “before-and-after methodology has been  
 8 accepted by numerous courts.”); *In re Dynamic Random Access Memory Antitrust Litig.*, No. M  
 9 02-1486 PJH, 2006 WL 1530166, at \*9 (N.D. Cal. June 5, 2006) (noting that the before-and-after  
 10 methodology has been “upheld by numerous courts”); *Bradburn Parent/Teacher Stores, Inc. v.*  
 11 *3M*, No. Civ.A.02-7676, 2004 WL 1842987, at \*14–18 (E.D. Pa. Aug. 18, 2004) (holding that  
 12 plaintiffs satisfied their burden of demonstrating that class-wide impact could be proved through  
 13 common evidence where plaintiff’s expert proposed the use of a before-and-  
 14 after methodology); *Nichols v. SmithKline Beecham Corp.*, No. CIV.A. 00-6222, 2003 WL 302352,  
 15 at \*8 (holding that the before-and-after methodology for calculating antitrust impact is a generally  
 16 accepted methodology for purposes of determining impact and damages on class-wide basis).

17 Second, the Court-Ordered Sales Data Set lacks product characterizations that appeared in  
 18 earlier productions. (Groves Decl., ¶ 6(c).) The limited descriptions available in the Court-Ordered  
 19 Sales Data Set do not reliably identify whether the products are telescopes, telescope accessories,  
 20 or other items Defendants have sold, whereas earlier productions did identify these characteristics.  
 21 (*Id.*) The Court-Ordered Sales Data Set also does not contain complete customer information. For  
 22 example, only 700 customers—all corporate retailers—are identified from 2016 to 2020. (*Id.*, ¶  
 23 6(d).) Even though Defendants sold directly to consumers through Celestron’s website, those sales  
 24 are conspicuously absent from the data set, although it is not clear whether their data has been  
 25 entirely omitted or summarily consolidated under corporate entities responsible for distribution or  
 26 direct shipments. (*Id.*) Defendants previously produced documents containing detailed customer  
 27 information. The following screenshots illustrate the changes to customer information that took  
 28 place prior to Defendants’ production of the Court-Ordered Sales Data Set. (*See supra*, Figs. 1-4.)

1 All told, sixteen fields of data are missing from the SyteLine documents, and twenty fields  
 2 are missing from the SAP By Design documents. (Groves Decl., ¶ 6(b).) Charts itemizing the  
 3 missing fields are attached as Exhibit 2 to Mr. Groves's Declaration. Defendants intentionally  
 4 altered this production using filters because this information was present in their first production.  
 5 (*Id.*, Ex. 2.)

6 Finally, the Court-Ordered Sales Data Set does not contain any cost data. (*Id.*, ¶ 6(e).)  
 7 Earlier productions by Defendants did contain that missing data, including "Landed Cost (Unit),"  
 8 "Landed Cost (Extended)," "Landed Cost," and "Margin." (*Id.*) Thus, Defendants again used filters  
 9 to remove key data and render their production non-useful in direct violation of the Court's Order.

10 After DPPs pointed out that Defendants had violated the Court's Order, Defendants made a  
 11 second production of Cost Data. Defendants' later-produced Court-Ordered Cost Data Set does  
 12 little to ameliorate the deficiencies in Defendants' original production and does not attempt to cure  
 13 any of the identified deficiencies in the Court-Ordered Sales Data Set beyond supplying some (still  
 14 incomplete) cost data. The sparse and fragmented data produced still violates Defendants'  
 15 obligations to produce complete, unfiltered transactional data, as ordered by the Court. While the  
 16 Court-Ordered Cost Data Set contains some cost data from 2005 to 2022, it clearly has been  
 17 filtered in violation of the Court's second Order. (*Id.*, ¶ 9.) By comparing the Court-Ordered Sales  
 18 Data set with the Court-Ordered Cost Data set, DPPs' expert determined that ***there are over 200***  
 19 ***products identified in the sales data for which there is no corresponding cost data.*** (*Id.*, ¶ 9(b).)<sup>1</sup>

20 In sum, Defendants have not produced their unfiltered transactional data as required by the  
 21 Court's Order; nor have they provided the facilitating information required by that Order; nor have  
 22 they provided an explanation for the months-long delay. DPPs have sought to avoid motion  
 23 practice through repeated meet-and-confers on these subjects, but Defendants still have taken no  
 24 action. This pattern of conduct shows that Defendants are not only in violation of the Court's  
 25 Orders, but their conduct is willful, as demonstrated by their omission of glaringly obvious fields—  
 26 like basic customer or price information—without which a production of transactional data cannot

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27  
 28 <sup>1</sup> The Court-Ordered Cost Data Set is riddled with other errors as well, including more than 1,183  
 records where the cost of a given product appears as null or zero. (*Id.*, ¶ 9(c).)

1 seriously be considered complete. Moreover, certain of the missing fields were included in  
 2 previous productions by Defendants, indicating their intention to withhold data that is necessary for  
 3 DPPs to make use or sense of the full transactional data set. Defendants' conduct is beyond  
 4 inadvertence, and at this point can only be seen for what it is: withholding of critical data for the  
 5 purpose of obstructing DPPs development of their case against Defendants. The transactional data  
 6 at issue here is the lifeblood of an antitrust class action and is the key evidence that will permit  
 7 DPPs to move for class certification and calculate overcharges. The Court has recognized the  
 8 importance of this evidence by previously ordering Defendants to produce it—twice. Defendants  
 9 are flouting this Court's Orders and causing significant prejudice to DPPs at the same time.

10 Based on Defendants' past and ongoing violations of the Court's Orders and refusal to  
 11 provide information regarding what they have done to comply, the Court should order Defendants  
 12 to fully comply with the Orders by producing all transactional data, including all incomplete or  
 13 omitted fields as described above, without applying any filters or limitations as directed in the  
 14 Court's second Order. The Court should also sanction Defendants for their violations of the Orders.

15 **II. SANCTIONS ARE WARRANTED**

16 Defendants' willful violation of the Court's Orders to produce complete, unfiltered  
 17 transactional data is plainly sanctionable conduct under Federal Rule of Civil Procedure 37(b). *See*  
 18 *Anderson v. Fresno Cty., Human Servs. Sys.*, No. 1:05-CV-1325-LJO, 2007 WL 1865657, at \*6  
 19 (E.D. Cal. June 28, 2007) ("Disobedient conduct not shown to be outside the control of the litigant  
 20 is all that is required to demonstrate willfulness, bad faith, or fault.") (citation omitted). Monetary  
 21 sanctions, covering DPPs reasonable expenses and attorney's fees in connection with their pursuit  
 22 of the still-unproduced transactional data, are mandated under Rule 37(b)(2)(C). The severity of  
 23 Defendants' violations also warrants ordering non-monetary sanctions against them, in the form of  
 24 an order precluding them from opposing class certification.

25 **A. DPPs' Expenses, Including Attorney's Fees, Under Rule 37(b)(2)(C)**

26 Rule 37(b)(2)(C) provides that when a party has violated a Court Order, "the court **must**  
 27 order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses,  
 28 including attorney's fees, caused by the failure, unless the failure was substantially justified or

1 other circumstances make an award of expenses unjust.” Fed. R. Civ. P. 37(b)(2)(C) (emphasis  
 2 added).

3 Defendants have engaged in a slew of dilatory tactics to avoid producing complete  
 4 transactional data for *over a year*. Such conduct is, without doubt, sanctionable under Rule  
 5 37(b)(2)(C). Courts in this district routinely find monetary sanctions appropriate for parties’  
 6 failures to comply with discovery-related orders such as the Orders at issue here. *See, e.g., Ingrid &*  
 7 *Isabel, LLC v. Baby Be Mine, LLC*, No. 13-cv-01806-JCS, 2014 WL 1338480, at \*8 (N.D. Cal.  
 8 Apr. 1, 2014) (awarding monetary sanctions, including “attorneys’ fees and costs associated with:  
 9 1) efforts to obtain responsive documents through subpoenas to third parties; 2) the completion of  
 10 depositions in Connecticut for which Plaintiff’s counsel was unable to adequately prepare because  
 11 of the late production; and 3) the filing of the instant motion,” for over two months’ delay of  
 12 compliance with court-ordered document production); *Varney v. Cal. Highway Patrol*, No. C11–  
 13 4193 TEH (JSC), 2013 WL 2299544, at \*3 (N.D. Cal. May, 24, 2013) (ordering payment of  
 14 “monetary sanctions for [Defendants’] reasonable time and expenses bringing” motion under Rule  
 15 37(b)(2) where “Plaintiff failed to comply with [the Court’s] Order for nearly seven months and  
 16 only did so after Defendants filed the underlying motion for sanctions”); *Adv. Microtherm, Inc. v.*  
 17 *Norman Wright Mech. Equip. Corp.*, No. C 04–2266 JW (PVT), 2010 WL 10133699, at \*2 (N.D.  
 18 Cal. Sept. 22, 2010) (ordering payment of monetary sanctions due to “Plaintiffs’ failure to comply  
 19 with this court’s February 26, 2010 Order for over five months . . . without ‘substantial  
 20 justification.’”). Defendants’ willful delay in producing the transactional data required by the  
 21 Orders far eclipses the delays found sanctionable in many other cases from courts in this district.  
 22 Nor have Defendants explained why their violations of the Orders are “substantially justified.” *See,*  
 23 *e.g., HRC-Hainan Holding Company, LLC v. Yihan Hu*, No. 19-mc-80277-TSH, 2020 WL  
 24 1643786, at \*3-5 (N.D. Cal. Apr. 2, 2020) (explaining that “the substantial justification inquiry  
 25 comes down to this: did the litigant make a diligent effort to avoid being in violation of the court  
 26 order?” and concluding that payment of fees was warranted in the absence of such a diligent effort).  
 27 Under Rule 37(b)(2)(C), monetary sanctions are therefore mandated.

28

1           In connection with DPPs' efforts to obtain Defendants' transactional data, counsel for DPPs  
 2 has incurred at least \$51,739.50 in attorney's fees. (Borden Decl., ¶ 31.) This sum is the product of  
 3 at least 77.3 hours of attorney and paralegal work relating to Defendants' transactional data,  
 4 including work on the initial motion to compel, this motion, the meet and confer efforts leading to  
 5 those motions, and time spent reviewing Defendants' deficient productions. DPPs have also  
 6 incurred expenses associated with Mr. Groves's analysis of Defendants' deficient productions of  
 7 transactional data, amounting to \$38,593.75 in fees. (*Id.*, ¶ 34.) In total, DPPs' have expended at  
 8 least \$90,333.25 in reasonable expenses and attorney's fees in their efforts to obtain complete,  
 9 unfiltered transactional data from Defendants, despite the Court ordering them to produce that data  
 10 twice.

11           **B. Defendants Should be Compelled to Explain Failure to Comply with Orders**

12           The Court should require Defendants to explain what they have done to comply with the  
 13 two Court Orders they violated. Their conduct raises significant concerns, and this relief is  
 14 necessary to ensure the integrity of the record in these proceedings.

15           Courts are empowered with discretion to address discovery shortcomings like Defendants',  
 16 including by ordering parties to explain the process leading to their deficient responses. *See* ECF  
 17 No. 595 at 5:1-4 in *Orion* action, 5:16-cv-06370 ("the Court requires Ningbo Sunny to submit a  
 18 declaration from a person with knowledge describing with specificity how Ningbo Sunny  
 19 conducted a search for documents responsive to Orion's post-judgment document requests"). *See*  
 20 *also California Earthquake Auth. v. Metro. W. Sec., LLC*, No. 2:10-CV-0291 MCE GGH, 2012  
 21 WL 6651152, at \*5 (E.D. Cal. Dec. 20, 2012) (ordering recipient of third-party subpoena to "fully  
 22 explicate the process it used to identify and produce' documents responsive to each of [the  
 23 subpoena's] requests for production"); *Stone Brewing Co., LLC v. MillerCoors LLC*, No.  
 24 18CV331-BEN-LL, 2019 WL 5677844, at \*4 (S.D. Cal. Oct. 31, 2019) (recommending the  
 25 imposition of monetary sanctions for defendant's failure "to adequately explain why a thorough  
 26 and extensive search and corresponding production of all remaining [responsive] materials was not  
 27 made until this procedural posture"), *report and recommendation adopted in relevant part*, No.  
 28 3:18-CV-0331-BEN-LL, 2020 WL 6112188 (S.D. Cal. Oct. 16, 2020).

1           As detailed in Mr. Groves's Declaration, various fields of transactional data are missing  
 2 from the productions Defendants have made to date. Additionally, the inconsistencies between  
 3 productions identified by Mr. Groves raise major concerns about the review and production process  
 4 that Defendants are using to generate their transactional data productions. Defendants should be  
 5 compelled to explain their review and production process in order to remedy the uncertainty they  
 6 have created by their incomplete and inconsistent productions.

7           **C.       The Court Should Preclude Defendants from Opposing Class Certification**

8           Rule 37(b)(2)(A) also permits the Court to order non-monetary sanctions for failure to obey  
 9 a discovery order. The Court is vested with the power to "issue further just orders," including:

- 10           (i) directing that the matters embraced in the order or other designated  
               facts be taken as established for purposes of the action, as the  
               prevailing party claims;
- 12           (ii) prohibiting the disobedient party from supporting or opposing  
               designated claims or defenses, or from introducing designated matters  
               in evidence;
- 14           (iii) striking pleadings in whole or in part;
- 15           (iv) staying further proceedings until the order is obeyed;
- 16           (v) dismissing the action or proceeding in whole or in part;
- 17           (vi) rendering a default judgment against the disobedient party; or
- 18           (vii) treating as contempt of court the failure to obey any order except  
               an order to submit to a physical or mental examination.

19           Fed. R. Civ. P. 37(b)(2)(A).

20           As explained above, the transactional data Defendants have withheld for over a year now is  
 21 the heart and soul of an antitrust case like this one. Complete data that shows all of Defendants'  
 22 transactions throughout the relevant time period, including customer information, product  
 23 characterizations, cost data, and other key characteristics is absolutely critical to DPPs' ability to  
 24 litigate this case. It is relevant to major upcoming case milestones, including class certification and  
 25 calculation of economic damages. DPPs are unable to acquire this data from any source other than  
 26 Defendants, yet Defendants continue to improperly deny DPPs access to this information.

1       The nature of Defendants' warrants the imposition of meaningful non-monetary sanctions  
 2 in addition to DPPs' reasonable expenses and attorney's fees. DPPs request that the Court order  
 3 non-monetary sanctions in the form of an order precluding Defendants from opposing certification  
 4 of the DPP class. The Court, "as a sanction for [Defendants'] failure to comply with discovery  
 5 orders, may order the matters at issue or other designated facts to be 'established' for purposes of  
 6 the action." *Li v. A Perfect Day Franchise, Inc.*, 281 F.R.D. 373, 393 (N.D. Cal. 2012) (citations  
 7 omitted). Such relief is subject to two requirements: "[f]irst, 'any sanction must be "just"; second,  
 8 the sanction must be specifically related to the particular "claim" which was at issue in the order to  
 9 provide discovery.'" *Id.* (quoting *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*,  
 10 456 U.S. 694, 695 (1982)). These limitations guide the Court in appropriately tailoring the  
 11 sanctions imposed on a party to the discovery malfeasance the party has engaged in. *Id.*; *see also*  
 12 *Resolute Forest Prods., Inc. v. Greenpeace Int'l*, No. 17-cv-02824-JST (KAW), 2022 WL  
 13 16637990, at \*7 (N.D. Cal. Nov. 2, 2022) (identifying factors courts should consider when  
 14 imposing sanctions, including "sanction[s] designed to . . . penalize those whose conduct may be  
 15 deemed to warrant such a sanction . . . [or] restore a prejudiced party to the same position he or she  
 16 would have been in absent the wrongdoing") (citing *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976); *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 589 (9th Cir.  
 17 1983)).

19       Courts in this District routinely find that preclusion sanctions are appropriate where a party  
 20 has willfully withheld production of relevant and responsive materials. *See, e.g., In re Ng*, No. 06–  
 21 30904 TEC, No. 07–3071 TC, 2009 WL 2905849, at \*3 (Bankr. N.D. Cal. Sept. 3, 2009), *aff'd sub  
 22 nom. Hewlett v. Elder*, No. C 09-4670 CRB, 2010 WL 702299 (N.D. Cal. Feb. 25, 2010), *aff'd sub  
 23 nom. In re Ng*, 419 F. App'x 720 (9th Cir. 2011) (precluding claimant from introducing evidence  
 24 due to her failure to produce responsive documents); *Resolute Forest Prods.*, 2022 WL 16637990,  
 25 at \*12 (recommending that, where party omitted material facts supporting its damages in court-  
 26 ordered interrogatory responses, "any damages theories first disclosed in the April 2022  
 27 interrogatory responses, as well as any supporting evidence, should be excluded"); *Apple, Inc. v.  
 28 Samsung Elecs. Co., Ltd.*, No. 11-CV-01846-LHK, 2012 WL 3155574, at \*3 (N.D. Cal. Aug. 2,

1 2012) (denying Samsung’s motion for relief from Magistrate Judge Grewal’s Sanction Order  
 2 precluding Samsung from introducing evidence that it failed to timely produce in response to court  
 3 order because “Samsung’s failure to fully comply . . . necessarily prejudiced Apple’s ability to  
 4 build its case . . . and to defend itself against cross-examination of its expert witnesses”).

5 Here, Defendants’ failure to timely produce complete transactional data is closely tied to—  
 6 and prejudicial to—DPPs’ ability to prepare for class certification in this case. Thus, DPPs’  
 7 proposed non-monetary sanction is appropriately related to Defendants’ failures to comply with the  
 8 Court’s two prior Orders. The scale of Defendants’ disobedience in willfully flouting the Court’s  
 9 Orders and suppressing key evidence is also such that a severe non-monetary sanction would be  
 10 appropriate and “just.” This is because the severity of the sanction would be proportional to the  
 11 egregiousness of Defendants’ conduct and the prejudice it has inflicted upon DPPs’ ability to  
 12 develop their case. *Cf., e.g., Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinée*, 456  
 13 U.S. 694 (1982) (affirming order establishing personal jurisdiction under Rule 37(b)(2) as sanction  
 14 for resisting jurisdictional discovery); *Gibson v. Chrysler Corp.*, 261 F.3d 927, 948 (9th Cir. Aug.  
 15 21, 2001) (finding that district court in diversity action could properly issue an order establishing  
 16 amount in controversy as discovery sanction, thus establishing subject matter jurisdiction).

17 For the foregoing reasons, the Court’s entry of an order precluding Defendants from  
 18 opposing certification of the DPP class is warranted.

19 **CONCLUSION**

20 For the reasons set forth above, Defendants should be ordered to complete their production  
 21 of unfiltered transactional data, provide answers to the facilitating questions posed by the Court,  
 22 and provide information about their document review and production process. Further, Defendants  
 23 should be sanctioned for violating the Court’s Orders, as set forth in the accompanying [Proposed]  
 24 Order.

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1 Dated: February 8, 2023

Respectfully submitted,

2 BRAUNHAGEY & BORDEN LLP

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By: /s/ Matthew Borden  
Matthew Borden

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Attorneys for Direct Purchaser Plaintiffs

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